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Supreme Court, U.S.
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No. 02-1055

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

JEANNE WOODFORD,
Warden of the California State Prison at San Quentin,
Petitioner

v.

WILLIAM CHARLES PAYTON,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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By appointment of the U.S. Court of Appeals for the Ninth Circuit under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(d)(6)

QUESTIONS PRESENTED

A. The Ninth Circuit concluded that the facts of this case compel a different outcome than that reached by this Court in Boyde v. California, 494 U.S. 370 (1989). Does that conclusion present unresolved legal issues that merit certiorari?

B. The Ninth Circuit held that California's "catch-all"mitigation instruction is cons evidence in mitigation. Is that holding a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989), even though it was not necessary to the circuit's decision?

C. The Ninth Circuit observed that on retrial Payton's jury must be instructed to "take his post-crime evidence into account." Is that a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989), which bars relief?

D. Assume the provisions of the AEDPA apply to this matter. Does that have any impact on the proper resolution of the issues presented in this case?

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 4

III. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI 8

A. The factual resolution of Mr. Payton's case does not merit certiorari. 8

B. The circuit's decision does not violate *Teague v. Lane.* 13

C. This Court's pending decision in *Woodford v. Garceau* will not affect the proper resolution of this case. 15

IV. CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES

United States Supreme Court

Boyde v. California,
494 U.S. 370 (1989) ..... passim

Eddings v. Oklahoma,
455 U.S. 104 (1982) 2

Godinez v. Moran,
509 U.S. 389 (1993) 13

Hopkins v. Reeves,
524 U.S. 88 (1998) 13

Lockett v. Ohio,
438 U.S. 586 (1978) 2

Penry v. Johnson,
532 U.S. 782 (2001) 2, 14

Penry v. Lynaugh,
492 U.S. 302 (1989) 2

Teague v. Lane,
489 U.S. 288 (1989) 2, 12, 14

United States v. Johnson,
457 U.S. 539 (1982) 14

Woodford v. Garceau,
__ U.S. __, 123 S. Ct. 32 2002 (No. 01-1862) 3, 15

United States Court of Appeals

Calderon v. United States District Court ("Kelly"),
163 F.3d 530 (9th Cir. 1998). 15

Payton v. Woodford,
299 F.3d 815 (9th Cir. 2002) 9, 14, 16

STATE CASES

People v. Payton,
3 Cal. 4th 1050 (1992). 16, 18, 19,20, 22

FEDERAL STATUTES

28 U.S.C. § 2254 (d)(1), and (2) 3

I. INTRODUCTION

In this case, the Ninth Circuit meticulously applied the principles and factors articulated by this Court in *Boyde v. California*, 494 U.S. 370 (1989), to the particular facts and circumstances of Mr. Payton's case. As a result of its adherence to *Boyde*, the circuit properly found that Mr. Payton was entitled to relief from his sentence of death. Dissatisfied with that outcome, Petitioner Woodford (hereafter the "State") erroneously portrays the circuit's *Payton* decision as a "circumvention" of the *Boyde* decision, in effect alleging that this Court in *Boyde* held that California's former "catch-all" mitigation instruction passes constitutional muster under every factual circumstance. This Court has never so held, and in fact declined in *Boyde* to consider whether the "catch-all" instruction would be constitutionally valid if applied to mitigating evidence concerning post-crime conduct, the only mitigation evidence offered at Mr. Payton's trial.

The circuit's *Payton* decision did in fact conclude that the plain meaning of California's "catch-all" instruction does not on its face apply to post-crime evidence. Nevertheless, that observation was of no material consequence to its conclusion that Mr. Payton was entitled to relief. This is so because the circuit granted penalty relief only after the court identified and applied each of the *Boyde*

factors to the facts in Mr. Payton's case. In every comparison, the facts in Mr. Payton's case differed so dramatically from the circumstances in *Boyde* as to establish a reasonable likelihood that the *Payton* jury did not consider such post-crime mitigating evidence. The failure of California's "unadorned" "catch-all" instruction to facially authorize consideration of post-crime evidence was only one of several factors analyzed by the circuit.

The State further criticizes the circuit for observing that upon retrial Mr. Payton is entitled to penalty instructions which properly instruct the jury that it must take Mr. Payton's post-crime evidence into account. Such comment, besides stating the obvious, is compelled by *Penry v. Johnson*, 532 U.S. 782, 804 (2001), holding that in determining of penalty, the jury must be given the means to implement the constitutional dictates of the Eighth Amendment. See also *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).[1]

Even though the circuit decision in *Payton* clearly tracks and fastidiously follows *Boyde* in every respect, the State belatedly contends that the circuit decision in *Payton* violates *Teague v. Lane*, 489 U.S. 288 (1989). Such contention

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[1] The State does not contest that the Eighth Amendment mandates that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(emphasis in original). See also, *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982).

was never presented to the panel that initially decided the case; nor was it presented to the en banc court deciding Mr. Payton's case until after the decision of the en banc court had been rendered. To suggest, as the State has herein, that this contention has been properly presented implies that an en banc court has no discretion to deny a petition for rehearing which raises a *Teague* claim for the first time. More importantly, the State's *Teague* contention completely disregards the fact that nothing in the en banc decision creates any "new" rule of law implicating *Teague*.

Finally, although this Court's decision in *Woodford v. Garceau*, __ U.S. __, 123 S.Ct. 32 (2002) (No. 01-1862), will determine the applicability of AEDPA to "cases pending" where a request for appointment of counsel was made before the effective date of the statute, the outcome of *Garceau* does not affect this case. The decision of the California Supreme Court denying the *Boyde* claim was both contrary to, or involved an unreasonable application of, clearly established federal law, and was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceedings. 28 U.S.C. § 2254 (d)(1), and (2).

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II. STATEMENT OF THE CASE

William Charles Payton was charged in the Superior Court of California in Orange County with capital murder, alleging a special circumstance of murder during the commission or attempted commission of rape of Pamela Montgomery, the attempted murder of two other persons, and the use of a knife during the commission of the crimes. The incident occurred in the early morning hours of May 26, 1980, at a boarding house in which all victims resided and in which Mr. Payton, a former resident, had been given permission to stay overnight.

No evidence was presented on Mr. Payton's behalf at the guilt phase of the trial. Mr. Payton's entire penalty phase presentation consisted of evidence relating to his post-arrest conduct, during the more than one and one-half years preceding his trial. The evidence established Mr. Payton's post-arrest conversion to Christianity and his conduct following that conversion. Eight witnesses testified to the sincerity of Mr. Payton's religious commitment, including a deputy sheriff, other prisoners, his mother, and members of the clergy. One prisoner testified that had it not been for Mr. Payton's intervention, he unquestionably would have committed suicide. Other prisoners testified as to Mr. Payton's successful efforts in organizing and assisting in bible study classes in jail, and the effect that Mr. Payton's religious commitment, as well as the example he set by living that

commitment, had on their lives. This evidence was corroborated by a deputy sheriff assigned to the jail, who testified that Mr. Payton's presence and activities while in custody operated as a significant calming influence among the jailed prisoners.

In an in-chambers conference with counsel for the parties, conducted immediately before the commencement of penalty argument, defense counsel orally requested that the court's instructions to the jury be modified by changing the language of factor (k) to direct the jury to consider Mr. Payton's post-arrest conduct.[2] The trial court, even though concluding that the case law supported the view that "almost anything can come in on behalf of the defendant, be argued" refused the requested instruction, and then authorized each side to argue its own view of whether the jury was legally permitted to consider such post-arrest evidence.

With that, the prosecutor presented his view of factor (k) to the jury:

"K" says any other circumstance which extenuates or lessens

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[2] Factor (k), the final or "catch-all"factor, was intended to permit the jury to consider all mitigating evidence offered by the defendant in support of a verdict of life. It provided: "In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable....(k) any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

> the gravity of the crime. What does that mean? That to me means some fact - - okay? - - some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new-born Christianity.

RT 2121-2122 (emphasis added).

At this point, defense counsel objected and moved at sidebar for a mistrial. The court denied the motion. Counsel then requested that the court instruct the jury that the post-crime evidence he presented on behalf of Mr. Payton does fall within the "catch-all" instruction of factor (k). The court refused counsel's request, advised both counsel that they were free to argue to the jury their own interpretation of factor (k), then instructed the jury that the comments of both the prosecution and defense are not evidence and should be placed in their proper context.

With that, the prosecutor continued to state his view of whether Mr. Payton's evidence fit within factor (k):

> Referring back to "K" which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.
>
> The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to lessen the gravity of the offense that the defendant has committed.
>
> [Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when-- under any other circumstance which extenuates or lessens the gravity

of the crime, refers -- seems to refer to a fact in operation at the time of the offense.

What I am getting at, you have not heard during the past few days any legal evidence [of] mitigation. What you've heard is just some jailhouse evidence to win your sympathy, that's all.

You've not heard any evidence of mitigation in this trial."

RT 2125.

.....

To vote for life without the possibility of parole in this case is to say that somewhere there are mitigating factors that outweigh the aggravating and outrageous factors of what the defendant did, and you've heard no evidence of any mitigating factors.

RT 2129.

.....

I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because I don't think its really applicable and I don't think it comes under any of the eleven factors....

RT 2129.

.....

You haven't heard anything to mitigate what he's done.

RT 2132-33.

Defense counsel argued that he disagreed with the prosecutor as to whether factor (k) covered Mr. Payton's post-crime conduct. He argued that such conduct was covered, though he acknowledged that the language of factor (k) was "awkwardly worded." RT 2151.

The trial court instructed the jury as to the factors that they were to consider and be guided by in deciding whether Mr. Payton would suffer death or life without the possibility of parole. Factor (k), the only factor which both parties agreed could conceivably cover Mr. Payton's post-crime conduct, provided for consideration of "any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime."

The jury returned a verdict of death. That verdict was affirmed on appeal by the California Supreme Court but the federal district court set aside the sentence of death in federal habeas corpus proceedings, on the ground that the prosecutor's erroneous penalty argument misled the jurors and prejudicially violated Mr. Payton's due process rights. An en banc panel of the Ninth Circuit affirmed the district court on the ground that there was a reasonable likelihood, based on the facts of Mr. Payton's case, that the jury applied the factor (k) instruction in a way that prevented consideration of his mitigating evidence.

III. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. The factual resolution of Mr. Payton's case does not merit certiorari.

The State's petition for writ of certiorari should be denied because it misconstrues the circuit's holding and because, in any event, neither of the issues

raised by the State as the basis for a grant of certiorari were material to the en banc decision in this case.

The State's contention that the circuit opinion "directly contravenes" this Court's holding in *Boyde* by limiting "the jury's consideration of mitigation evidence to circumstances *related to the crime*"[3] misconstrues the *Payton* decision. In fact, the circuit opinion does no such thing. To the contrary, the opinion specifically acknowledges that "[t]he United States Supreme Court held that the factor (k) instruction was not ambiguous as applied to pre-crime background and character evidence as long as the trial court provided clarification as to its meaning," and that "the Court held that factor (k) passed constitutional muster because there was no 'reasonable likelihood' that the jury was misled into believing it could not consider Boyde's mitigating evidence." *Payton v. Woodford*, 299 F.3d 815, 829 (9th Cir. 2002) (hereafter "Opinion"), citing *Boyde v. California*, 494 U.S. at 381-82, n.5. The Opinion correctly notes that this Court in *Boyde* did not address whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence and finds it significant that this Court in *Boyde* distinguished the pre-crime character evidence present there from evidence – such as Mr. Payton's – that "pertain[ed] to prison

[3] Petition for Writ of Certiorari (hereafter "Petition") at 11 (emphasis in original).

behavior after the crime for which he was sentenced to death." Opinion at 824, citing *Boyde*, at 382 n.5. As note 5 of *Boyde* makes clear, this Court did not address whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence. Mr. Payton's case squarely presented that issue to the circuit, which concluded that the factor does not, on its face, admit consideration of post-crime conduct of the defendant. This circuit holding on an issue never previously decided by this Court certainly could not be in contravention of *Boyde.*

Moreover, the circuit's holding that "the natural reading of the words of the unadorned factor (k) instruction" does not allow for consideration of post-crime evidence (Opinion at 823) is more comment than it is a definitive ruling on the constitutional validity of the instruction as applied to such evidence. If the circuit had intended to rely upon that holding as the basis for granting relief, there would have been no further need to evaluate all of the other factors considered by this Court in *Boyde* to reach a proper resolution. In fact, however, the *Payton* decision considered a plethora of other facts – including the extent of the erroneous prosecutorial argument; the fact that such post-crime evidence was the only mitigation raised by Mr. Payton; the trial court's complete refusal to instruct the jury as to whether they could consider such post-crime evidence; and the failure of

the other penalty instructions to provide that such post-crime evidence could be considered – before concluding that there was not a reasonable likelihood that the jury considered such post-crime evidence.

Here, unlike *Boyde*, the prosecutor in Mr. Payton's case vigorously argued that the jury could **not** consider the defendant's post-crime conduct. Unlike *Boyde*, which involved only the consideration of evidence of character which **pre-dated** the crime, the evidence of mitigation in Mr. Payton's case involved **only** evidence of character developed **after** the crime had been committed. And unlike *Boyde*, the trial court in Mr. Payton's case: (1) affirmatively refused defense counsel's request to clarify the factor (k) instruction; (2) refused counsel's request to instruct the jury that the prosecutor's improper argument was erroneous; and, (3) declined to give the jury any guidance as to the correct meaning of the instruction after both counsel had provided the jury with their own legal interpretation of the law. The circuit evaluating Mr. Payton's case considered and weighed each of these factors – just as this Court did in *Boyde* – in determining whether there was a reasonable likelihood that the jury failed to consider relevant mitigating evidence in their determination of penalty. The State's contention that certiorari should be granted simply because the circuit articulated the view that California's "unadorned" "catch-all" instruction does not, on its face, allow for

consideration of post-crime conduct disregards this meticulous process employed by the en banc court to arrive at its decision.

In the same manner, the State's contention that certiorari should be granted because the circuit "imposes a duty on the State to provide **a particular instruction** directing the jury to 'take . . . post-crime evidence into account'" (Petition at 17 [emphasis added]) is ludicrous. In the first place, the circuit did no such thing. It simply declared the obvious, *to wit*, that Mr. Payton "is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime mitigation evidence into account . . ." Opinion at 830. Secondly, as the circuit's opinion in *Payton* itself notes, California has already modified its "catch-all" instruction to include consideration of such post-crime conduct.[4] As a consequence, on penalty retrial, Mr. Payton will be provided, finally, with an instruction which permits the jury to consider such post-crime evidence – all without the circuit "interference" which the State erroneously argues necessarily flows from the en banc decision in this case.

All of these facts demonstrate that certiorari is not appropriate.

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[4] The instruction, as modified, now provides that the jury may consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." See Opinion at 823 n.5.

B. The circuit's decision does not violate *Teague v. Lane.*

The State additionally contends that the circuit opinion created a "new rule" of law and that Mr. Payton is barred from realizing the benefits of that rule under *Teague v. Lane*, 489 U.S. 288 (1989). The State's contention is both legally erroneous and procedurally defaulted.

The contention is procedurally defaulted because it was not presented to the circuit until after the en banc court issued its opinion on the merits. The contention was not presented in either the Appellant's Brief or the Reply Brief submitted by the State in its appeal, nor did the State present this claim in the Respondent's Brief submitted by the State in Mr. Payton's appeal. Neither was it presented in the responsive brief submitted by the State in opposition to Mr. Payton's petition for rehearing of the circuit panel decision or for hearing en banc, nor in the State's oral argument before the en banc court. The State's *Teague* contention was raised for the first time **after** the en banc court rendered its final decision on the merits, long past the time for appropriate judicial consideration of legal contentions.

This Court has held that the burden of asserting nonretroactivity belongs on the state, and the state's failure to raise that claim can be deemed a waiver. See *Hopkins v. Reeves*, 524 U.S. 88, 94 n.3 (1998); *Godinez v. Moran*, 509 U.S. 389,

397 n.8 (1993).

On the merits as well, the State's contention is erroneous, because nothing in the circuit's opinion created a "new rule of law" that raises a *Teague* bar.

As set forth above in section A, the circuit's opinion in Mr. Payton's case did not create a new rule of constitutional procedure. It simply applied the factors articulated by this Court in *Boyde* to the facts in Mr. Payton's case, and it concluded that it was "reasonably likely that the text of factor (k) and trial court's failure to correct the prosecutor's misstatements about the reach of factor (k) caused the jury to disregard relevant mitigating evidence, and that this error was not harmless." *Payton v. Woodford*, 299 F.3d. at 819.

As in *Boyde*, the circuit viewed the "jury instructions in the same way a jury would – with commonsense understanding of the instructions in the light of all that has taken place at the trial," *Penry v. Johnson*, 532 U.S. 782, 800 (2001) (quoting *Boyde*, 494 U.S. at 381). The circuit opinion clearly does not create a "new rule" under *Teague* because it did not break "new ground or impose[] a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. The decision here is nothing more than the application of settled precedents to a new and different factual situation; this application does not constitute a "new rule" because it does not alter the precedent settled by *Boyde* in any material way.

See *United States v. Johnson*, 457 U.S. 539, 549 (1982). Accordingly, the en banc decision in this case is not barred by *Teague*.

C. This Court's pending decision in *Woodford v. Garceau* will not affect the proper resolution of this case.

The circuit in *Payton* concluded, consistent with its prior decision in *Calderon v. United States District Court ("Kelly")*, 163 F. 3d 530, 540 (9th Cir. 1998), that even though Mr. Payton had not filed his federal habeas petition as of the date that the AEDPA became effective, Mr. Payton's case was nevertheless "pending" before the AEDPA became effective – and therefore is not subject to its provisions – because his counsel had filed a request for appointment of counsel and application for stay of execution by that time. The State argues that the AEDPA does apply to this case, and notes that this issue is presently pending before the Court in *Woodford v. Garceau*, __ U.S. __, 123 S. Ct. 32 (2002)(No. 01-1862).

Mr. Payton believes that his *Boyde* penalty claim was correctly resolved by the circuit regardless of whether the AEDPA standard applies to his case. Even if the AEDPA standard does apply to Mr. Payton's case, the circuit decision should stand because the ruling of the California Supreme Court denying Mr. Payton's

Boyde claim involved an unreasonable application of clearly established federal law, and was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceedings.

Perhaps the state court's most fundamental failure to apply the law clearly established by *Boyde* to Mr. Payton's case involves its complete failure to approach the "jury instructions in the same way a jury would – with commonsense understanding of the instructions in the light of all that has taken place in the trial." *Boyde*, 494 U.S. at 381. The en banc decision notes[5] – as does the dissent in the state court decision[6] – that the mitigation evidence presented in *Payton* concerned **only** post-arrest evidence relating to the defendant's character, and, accordingly, was less likely to qualify as "any other circumstance which extenuates the gravity of the crime . . ." (factor k) than the **pre-crime** character evidence presented in *Boyde*. The California Supreme Court, in completely failing to determine whether the jury's commonsense understanding of the unadorned factor (k) instruction would include consideration of the post-crime mitigating evidence presented in Mr. Payton's case, erroneously applied the federal law clearly established by this Court in *Boyde*, and unreasonably failed to

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[5] *Payton v. Woodford*, 299 F. 3d at 824.

[6] *People v. Payton*, 3 Cal. 4th 1050, 1083-1084 (1992).

properly evaluate the facts in Mr. Payton's case which were distinguished from the facts present in *Boyde*.

Moreover, the opinion of the California Supreme Court is littered with numerous other instances demonstrating the state court's unreasonable determination of the facts, including:

1. The California Supreme Court completely fails to address the fact that, contrary to circumstances in *Boyde*, both parties in Mr. Payton's case – with the complete approval of the trial court – actively argued to the jury their version of how the jury should interpret the law, and the trial court, because it refused to tell the jury that it must consider Mr. Payton's post-crime evidence, left it completely up to the jury to decide this critical legal issue. This was not an issue in *Boyde* because there the prosecutor "never suggested the [defendant's] background and character evidence could not be considered." *Boyde*, 494 U.S. at 385. "Indeed, the prosecutor explicitly assumed that petitioner's character evidence was a proper factor in the weighing process, but argued that it was minimal in relation to the aggravating circumstances." *Id.* Thus, in *Boyde*, there was no disagreement between counsel as to the meaning of the instruction, and accordingly, there was no apparent need for the court to "adorn" the factor (k) instruction so that the jury would understand that such post-crime evidence must

be considered by them.

In Mr. Payton's case, however, counsel were engaged in an on-going battle before the jury as to the meaning of the instruction. The trial court not only refused to instruct the jury on the correct interpretation of the law to follow, it specifically authorized opposing counsel to argue his own view of the law that the jury was obliged to follow in its determination of penalty. The complete failure of the state court to address this critical factual difference constitutes an unreasonable application of the facts.

2. The state court held that the prosecutor's argument "was immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyer's comments were not 'evidence' but 'argument' and 'to be placed in [their] proper perspective." *People v. Payton,* 3 Cal. 4th at 1071. In fact, as noted in the state court dissent (*Id.* at 1084-85), the effect of the trial court's ruling was most certainly not "blunted," because the trial court **overruled** defense counsel's objection to the improper argument, and because, immediately after such ruling, the prosecutor proceeded, numerous times, to strenuously urge the jury that it could not legally consider such mitigation evidence. Under these circumstances, the state court's determination of the facts was unreasonable.

3. The state court concluded that the prosecutor "implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." *People v. Payton*, 3 Cal. 4th at 1071. As the dissent correctly notes, "the prosecutor made no such concession." *Id.* at 1085. While the prosecutor did discuss the mitigating evidence, "he prefaced his remarks by reminding the jury that the evidence was not 'applicable,'" and [a]t no time did the prosecutor acknowledge, explicitly or implicitly, that the jury could legally consider defendant's mitigating evidence." *Id.* Thus, the state court's determination that the prosecutor "implicitly conceded" the relevance of the mitigating evidence offered by Mr. Payton was an unreasonable determination of the facts.

4. The state court, to support its conclusion that there was no reasonable likelihood that the jury was misled as to the meaning of factor (k), noted the effort of defense counsel, in his penalty argument, to overcome the prosecutor's argument that the jury could not consider such evidence. After noting these efforts, the court observed, "The [trial] court did not permit the prosecutor to argue in rebuttal." *People v. Payton*, 3 Cal. 4th at 1072. This statement is nothing less than a complete mischaracterization of the evidence. The statement implies that the trial court denied a request of the prosecutor to rebut

defense counsel's correct statement of the law to the jury. In fact, the prosecutor not only did **not** make such a request, he specifically agreed with the trial court's decision – articulated before the penalty phase testimony even started – to leave the last penalty argument with the defense.[7] This erroneous comment by the state reviewing court -- which incorrectly portrays the trial court as taking affirmative action in an effort to fairly balance the respective positions of the parties during the heat of penalty argument -- is an unreasonable determination of the facts.

5. The state court completely fails to address **the extent** of the prosecutor's improper argument urging the jurors that they could not legally consider Mr. Payton's mitigation evidence. The opinion cites only one instance of improper prosecutorial argument.[8] But the prosecutor engaged in substantial

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[7] The Court: "As far as closing, I will put on the record, get into – I intend to have the People open and the defense close, just to give you each one shot.

Jacobs [Prosecutor]: That's fine.

Merwin [Defense Counsel]: That is fine.

Jacobs: That's what I expected.
RT pp. 1903-04.

[8] "The factor, he told the jury, 'says any other circumstance which extenuates or lessons the gravity of the crime. What does that mean? That to me means some...factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only evidence you have heard has been about this new born Christianity.'" *People v. Payton*, 3 Cal. 4th at 1071.

additional improper argument which was never considered or addressed by the court.[9] The state court's failure to consider the pervasiveness of the prosecutor's argument in gauging the effect of such argument on the likelihood that the jury believed it could not consider such evidence, constituted an unreasonable determination of the facts.

6. The California Supreme Court utterly failed to consider the effect of

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[9] "Referring back to "k" which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.

The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.

[Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when-- under any other circumstance which extenuates or lessens the gravity of the crime, refers -- seems to refer to a fact in operation at the time of the offense.

What I am getting at, you have not heard during the past few days any legal evidence [of] mitigation. What you've heard is just some jailhouse evidence to win your sympathy, that's all. You've not heard any evidence of mitigation in this trial."
RT 2125.

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" To vote for life without the possibility of parole in this case is to say that somewhere there are mitigating factors that outweigh the aggravating and outrageous factors of what the defendant did, and you've heard no evidence of any mitigating factors."
RT 2129.

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"I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because I don't think its really applicable and I don't think it comes under any of the eleven factors..."
RT 2129.

.....

"You haven't heard anything to mitigate what he's done."
RT 2132-33.

relevant instructions on the likelihood that the jury believed they could not consider Mr. Payton's post-crime conduct in its determination of penalty. In upholding Mr. Payton's death sentence, the state court referred to only a portion of one of the penalty instructions given to the jury -- that the jury consider "all of the evidence which has been received during any part of the trial" in its determination of penalty. *Payton*, 3 Cal. 4th at 1072. But as the state court dissent suggests, in failing to note the entire instruction, the majority's partial quote takes the instruction out of context. *Id.* at 1085. In context, the instruction tells the jury to "consider all of the evidence which has been received during any part of the trial in this case, *except as you may be hereafter instructed.*" *Id.* (emphasis in original). The instructions which followed were the list of aggravating and mitigating instructions which governed the jury's decision of life or death, including the unadorned factor (k).

Moreover, as the dissent further notes,

> An additional instruction also suggested to the jury that it should disregard the mitigating evidence presented by the defense. The court instructed the jury: "After having heard all of the evidence and *after having heard and considered the argument of counsel*, you shall consider, take into account *and be guided by the applicable factors of aggravating and mitigating circumstances* upon which you are being instructed." The court's statement to the jury that its consideration of "all of the evidence" should be guided by "the arguments of counsel" and "the applicable factors of aggravating and mitigating

> circumstances" was tantamount to an instruction to the jury that its power to consider the evidence was not unlimited.

Payton, 3 Cal. 4th at 1085-86 (emphasis in original).

Thus, the failure of the state court to consider the commonsense context of all of the penalty phase instructions constitutes an unreasonable determination of the facts in light of the evidence presented, and accordingly, the determination of the state court is entitled to no deference.

For all of these reasons, the ruling of the California Supreme Court in denying Mr. Payton's claim under *Boyde* involved an unreasonable application of clearly established federal law, and was based upon an unreasonable determination of the facts in light of the evidence presented at the state court proceedings. As such, whether or not the AEDPA is applicable to Mr. Payton's case, the State's contentions are without merit.

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IV. CONCLUSION

The petition for writ of certiorari should be denied.

DATED: March 12, 2003.

Respectfully submitted,

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By _____
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